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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

BOBBY JOHN ARELLANES,

Defendant and Appellant.

2d Crim. No. B199032
(Super. Ct. No. VA095789-01)
(Los Angeles County)

Bobby John Arellanes appeals a judgment following conviction of premeditated attempted murder and assault with a firearm, with findings of personal weapon use and commission of the crimes to benefit a criminal street gang. (Pen. Code, §§ 187, subd. (a), 664, 245, subd. (a)(2), 12022.53, subds. (b)-(c), 186.22, subd. (b)(1)(C).)¹ We modify the judgment to strike the 15-years-to-life gang enhancement for count 1; modify the five-year gang enhancement to three years for count 2; and award 43 days of presentence conduct credit. We otherwise affirm.

FACTS AND PROCEDURAL HISTORY

Arellanes, whose moniker is "Capone," is a member of the "Brown Authority" criminal street gang.² He and Debrina Hernandez were friends, and he visited her home frequently.

¹ All further statutory references are to the Penal Code.

² Brown Authority is also known as "Brown Assassins." At trial, the parties and witnesses used the names interchangeably. In the interests of consistency, we refer to the gang as "Brown Authority."

In the late afternoon of April 3, 2006, Arellanes and his friend Angel visited Hernandez. She informed them that her mother no longer allowed them to visit. Arellanes then asked Hernandez to drive him to a friend's home, and she agreed.

Arellanes sat in the front passenger seat of Hernandez's silver-colored Ford automobile. Angel sat in the rear passenger seat. During the drive, Hernandez's cell phone rang on several occasions. Arellanes answered it and engaged in conversations. After the third call, Arellanes asked Hernandez to drive to Streamland Park to pick up another street gang member, "Boy."

After driving into the park, Hernandez saw Boy and drove towards him. Arellanes and Boy exchanged nods, and Boy pointed in a direction.

Hernandez continued driving until Arellanes directed her to stop near a man, David Morones, who was entering his automobile. Arellanes shouted, "Where you from, Ese?" Morones responded, "Where you from?" Angel replied, "B-A, homey." Morones replied, "Viejo."

Arellanes then leaned out the passenger side window and fired a gun toward Morones. Morones responded by retrieving a gun from his waistband and firing it toward Arellanes. Hernandez heard Arellanes fire his gun five times. She ducked when she sensed an object hitting her head.

Arellanes sat back inside the automobile and placed the gun in his lap. Hernandez had seen another Brown Authority gang member with the gun several weeks earlier. Arellanes had then taken a photograph of the weapon with Hernandez's camera.

Hernandez's automobile was damaged from the gunfire exchange. Her right rear tire was flat, and the back window glass was broken. Hernandez drove to a gasoline station where Arellanes and Angel repaired the flat tire. Eventually, she drove them to Whittier where they removed the broken glass from the back window and replaced it with a black plastic bag. Hernandez then drove the men to Maywood and returned to her home.

Parents attending a children's baseball game at the park witnessed the shooting. Although they could not identify the passengers in the silver-colored automobile, one mother saw that the front seat passenger fired the gun. Another parent, Annette Adame,

was walking nearby when the gunfire began. She heard gunshots and realized that her left leg felt warm. A bullet had grazed her leg, causing minor bleeding (count 2).

Los Angeles County Sheriff's Deputy Hank Ortega testified as an expert witness regarding criminal street gangs, including the Brown Authority. He stated that the Brown Authority and Pico Viejo criminal street gangs each claimed Streamland Park as their territory. Ortega opined that the shooting was committed for the benefit of the Brown Authority because the two gangs were rivals. He also stated that Arellanes was a member of the Brown Authority and that its gang members committed weapon, property, and drug crimes.

Los Angeles County Sheriff's Deputy Craig Johnson compared fingerprints taken from the rear wheel well area of Hernandez's automobile with those of Arellanes, and concluded that he left the fingerprints on the automobile.

The jury convicted Arellanes of premeditated attempted murder (count 1 [victim Morones]) and assault with a firearm (count 2 [victim Adame]). (§§ 187, subd. (a), 664, 245, subd. (a)(2).) It found that he personally used a firearm during the attempted murder, and that he committed the crimes to benefit a criminal street gang. (§§ 12022.53, subds. (b)-(c), 186.22, subd. (b)(1)(C).) For count 1, the trial court sentenced Arellanes to 15 years to life, plus 20 years for the firearm enhancement, plus an additional 15 years to life for the criminal street gang enhancement. For count 2, it sentenced him to the midterm of three years, plus five years for the criminal street gang enhancement, to be served consecutively to count 1. The court imposed a \$200 restitution fine, a \$200 parole revocation restitution fine, and a \$20 court security fee, and awarded Arellanes 292 days of presentence custody credit.

Arellanes appeals and contends that: 1) Hernandez's testimony is insufficient to support the judgment because it is uncorroborated accomplice testimony; 2) the trial court erroneously instructed regarding the burden of producing evidence that Hernandez was an accomplice (CALJIC No. 3.19); 3) the prosecutor committed misconduct by improperly defining abiding conviction; 4) the trial court erred by denying his motion to bifurcate the criminal street gang allegation; and 5) the trial court committed sentencing errors.

DISCUSSION

I.

Arellanes argues that Hernandez was an accomplice to the crimes, and that insufficient evidence corroborates her testimony. (§ 1111 [An accomplice is "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given"].) He points out that the need for corroborating evidence arises from the suspect nature of accomplice testimony. (*People v. Guiuan* (1998) 18 Cal.4th 558, 565 [discussing long-standing rule that accomplice testimony should be viewed with distrust].)

Section 1111 provides that "[a] conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." The corroborating evidence must tend to implicate the defendant, although it need not establish every element of the offense charged. (*People v. Perry* (1972) 7 Cal.3d 756, 769, overruled on other grounds by *People v. Green* (1980) 27 Cal.3d 1, 28-34 [discussion of general rule].) The corroborating evidence may be slight and entitled to little consideration when viewed alone. (*Ibid.*) "The trier of fact's determination on the issue of corroboration is binding on the reviewing court unless the corroborating evidence should not have been admitted or does not reasonably tend to connect the defendant with the commission of the crime." (*People v. Abilez* (2007) 41 Cal.4th 472, 505.)

Here the trial court instructed regarding the definition of an accomplice (CALJIC No. 3.10), the requirement of corroborating evidence (CALJIC No. 3.11), the sufficiency of evidence necessary to corroborate an accomplice's testimony (CALJIC No. 3.12), the criminal intent required of an accomplice (CALJIC No. 3.14), the need to view accomplice testimony with caution (CALJIC No. 3.18), and the burden of proving a witness is an accomplice (CALJIC No. 3.19).

Sufficient evidence corroborates Hernandez's testimony. Independent evidence established that Arellanes is a member of the Brown Authority criminal street gang, and that victim Morones is a member of a rival street gang. Each gang claimed the

territory of Streamland Park. Several weeks prior to the shooting, Arellanes and another Brown Authority gang member used Hernandez's camera and took a photograph of the gun that they later used in the shooting. The court admitted the photograph into evidence at trial. Moreover, a fingerprint expert identified fingerprints found near the wheel well of Hernandez's rear passenger tire as belonging to Arellanes. This corroborating evidence sufficiently connects Arellanes to the shooting at the park.

II.

Arellanes contends that the trial court erred by instructing with CALJIC No. 3.19, "Burden to Prove Corroborating Witness Is an Accomplice." He asserts that the instruction is confusing and erroneously places the burden of producing evidence that a witness is an accomplice upon the defendant. Arellanes argues that the error lightens the prosecutor's burden of proof and is not harmless beyond a reasonable doubt.

Our Supreme Court has approved CALJIC No. 3.19 and has rejected arguments regarding its constitutionality. (*People v. Frye* (1998) 18 Cal.4th 894, 967-969, overruled on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 [defendant properly required to prove accomplice status by a preponderance of the evidence]; *People v. Fauber* (1992) 2 Cal.4th 792, 833-834 [defendant has burden of proof by preponderance of the evidence that prosecution witness was accomplice].) The instruction here was proper. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Moreover, Hernandez's testimony was sufficiently corroborated by independent evidence connecting Arellanes to the crimes. (*Ante*, I.) The prosecution presented evidence regarding his gang membership and rivalry with the Pico Viejo gang; territorial claims regarding Streamland Park; his fingerprints above the right rear wheel well of Hernandez's automobile; and a photograph that he took of the gun later used in the shooting.

III.

Arellanes argues that the prosecutor committed misconduct by improperly defining "abiding conviction" as: "When you come to a stop sign, you [] look both ways. You have an abiding conviction that there are no other cars. You move through. Those are

decisions people make every day." He contends that the prosecutor trivialized the reasonable doubt standard by comparing it to decisions made in everyday life. (*People v. Johnson* (2004) 119 Cal.App.4th 976, 985-986 [trial court's instructions equating reasonable doubt to everyday decisionmaking constituted reversible error]; *People v. Johnson* (2004) 115 Cal.App.4th 1169, 1172 [same].) Acknowledging that his attorney did not object and request an admonition, Arellanes now asserts that he did not receive the effective assistance of counsel.

We need not decide whether the prosecutor's brief analogy was misconduct, because there is no error under any standard of review. The trial court instructed with CALJIC No. 2.90, regarding reasonable doubt, and with CALJIC No. 1.00, directing the jury to follow the court's instructions and not statements of law made by the attorneys. We presume the jury understood and followed the court's instructions. (*People v. Young* (2005) 34 Cal.4th 1149, 1214; *People v. Nguyen* (1995) 40 Cal.App.4th 28, 36-37 [prosecutor's mischaracterization of reasonable doubt standard as everyday decisionmaking not prejudicial where prosecutor referred the jury to instruction].)

We also reject Arellanes's claim of ineffective assistance of counsel because he has not established prejudice—a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 694; *In re Thomas* (2006) 37 Cal.4th 1249, 1256.)

IV.

Arellanes asserts that the trial court abused its discretion by denying his motion to bifurcate the criminal street gang allegation. He points out that the prosecution relied upon count 1 as a predicate offense (in addition to a 2004 robbery conviction of another Brown Authority member) for the gang allegation. (§ 186.22, subd. (e) [defines "pattern of criminal gang activity" as commission of two or more enumerated offenses on separate occasions by two or more persons].) Arellanes argues the logic is circular and denied him due process of law. He contends the error is not harmless beyond a reasonable doubt.

The trial court possesses a broad discretion to bifurcate trial of a charged criminal street gang enhancement. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1050.)

Frequently evidence relating to the gang enhancement is relevant and "inextricably intertwined" with the charged offense. (*Id.* at p. 1048.) "Evidence of the defendant's gang affiliation-including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like-can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime." (*Id.* at p. 1049.)

The trial court did not abuse its discretion by denying the bifurcation motion. Much of the evidence tended to prove both the underlying crimes and the gang enhancement. Evidence of the gang membership, rivalry, and territorial claims was relevant to establish identity and a motive for the otherwise senseless charged crimes. Evidence of the predicate 2004 robbery was brief and no more inflammatory than evidence of the charged offenses. Moreover, our Supreme Court has held that the charged offense may be considered in establishing the requisite "pattern of criminal gang activity" required by statute. (*People v. Gardeley* (1996) 14 Cal.4th 605, 625.) "[T]he trial court's discretion to deny bifurcation of a charged gang enhancement is . . . broader than its discretion to admit gang evidence when the gang enhancement is not charged." (*People v. Hernandez, supra*, 33 Cal.4th 1040, 1050.) Arellanes has not established error.

V.

Sentencing Errors

Arellanes contends that the trial court erred in applying the criminal street gang enhancements to counts 1 and 2. He asserts that the court improperly imposed an additional 15-year-to-life term for count 1, pursuant to section 186.22, subdivision (b)(1)(C), and an unauthorized five-year term for count 2. The Attorney General concedes, but requests that we remand in order that the trial court exercise its discretion in sentencing for count 2.

The criminal street gang enhancement for premeditated attempted murder increases the minimum parole eligibility from 7 years to 15 years. (§ 186.22, subd. (b)(5); *People v. Lopez* (2005) 34 Cal.4th 1002, 1004.) It does not provide for an additional 15-year-to-life term. (*Ibid.*)

Section 186.22, subdivision (b)(1)(A) provides for a two, three, or four-year enhancement for count 2. In imposing sentence for the assault with a firearm, the trial court imposed the midterm, noting that the jury found no factors in aggravation. There is no reason to believe the trial court would impose the aggravated four-year enhancement term, given its application of the midterm for the underlying offense. Thus we deny the Attorney General's request for a remand for resentencing.

Arellanes also argues that the trial court erred by denying him any presentence conduct credit. (§ 2933.1.) The Attorney General concedes that section 2933.1 requires an award of 43 days of presentence conduct credit here. (*People v. Acosta* (1996) 48 Cal.App.4th 411, 427-428 [reviewing court may correct presentence award of custody credits if other issues are presented on appeal].)

We modify the judgment to strike the 15-years-to-life gang enhancement for count 1; modify the gang enhancement from five years to three years for count 2; and award 43 days of presentence conduct credit. The trial court shall amend the abstract of judgment accordingly, and forward the amended abstract to the Department of Corrections. We otherwise affirm.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

COFFEE, J.

PERREN, J.

Richard M. Goul, Judge
Superior Court County of Los Angeles

Alan Siraco, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, Catherine Okawa Kohm, Deputy Attorney General, for Plaintiff and Respondent.